

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH FRANK SWANSON,

Defendant-Appellant.

UNPUBLISHED

May 9, 2013

No. 311132

Eaton Circuit Court

LC No. 11-020098-FC

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct MCL 750.520c(1)(a). The trial court sentenced defendant to concurrent prison terms of 140 to 240 months for each of the CSC I convictions and 120 to 180 months for the CSC II conviction. Defendant appeals as of right. We affirm.

Defendant's granddaughter accused him of repeatedly molesting her when she was a child. She testified that defendant repeatedly assaulted her when she was five years old, and that the molestation did not cease until her uncle walked in on her in her underwear and defendant naked in defendant's room. In a recorded phone call between defendant and the victim's mother, defendant denied the molestation but admitted to being naked in his bed with the victim, putting his arms around her, and wrestling with her. Defendant's wife testified that she was not aware of any abuse, and the uncle denied walking in on defendant with the victim. Defendant did not testify.

Defendant first argues that he was provided ineffective assistance of counsel as a result of trial counsel's failure to advise him that the victim's testimony, if believed, would be sufficient to convict him. Under both the federal and state constitution, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms, that there is a reasonable probability that, but for the error, the result of the proceedings would have been different, and that the resultant

proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Where, as here, there has been no *Ginther*¹ hearing, ineffective assistance of counsel claims are preserved only to the extent that the mistakes made by counsel are apparent on the record. *People v Wilson*, 196 Mich App 604; 493 NW2d 471 (1992).

Here, the prosecutor informed potential jurors, in defendant's presence, that the victim's testimony would be sufficient to support a conviction if the jury accepted it as true. Accordingly, even if counsel did not personally advise defendant, the failure to repeat it would not fall below a professional norm. Moreover, there is no indication that the outcome would have been different if defendant had testified. Defendant asserts that he would have testified that he was in bed nude when his granddaughter came into the room and jumped on the bed, that he hugged her, tickled her, and basically frolicked around in a normal grandfatherly manner, and that although he physically touched her while doing so, it was not in a sexual or inappropriate manner. These representations are almost entirely duplicative of the statements made by defendant in the recorded phone call that was played for the jury. Moreover, they can hardly be described as exculpatory. As such, it is highly unlikely that the outcome of the trial would have been changed had defendant testified.

The remaining issues were raised by defendant in a Standard 4 brief. Defendant argues that the trial court erred by failing to dismiss juror number six during jury selection. Juror number six informed the court that her now father-in-law had been previously tried for assaulting her now stepdaughter. She initially indicated that she was biased, but after instruction by the trial court and questioning by both the prosecution and the defense, she testified that she could weigh the evidence impartially and refrain from applying any feelings about the prior case to the present case.

Under MCR 6.42(D)(2), a trial court must excuse a juror if the court finds that a ground for challenging the juror is present. Among those grounds is the presence in the juror's mind of a bias or state of mind that would prevent the juror from rendering a just verdict. MCR 2.511(D)(2) and (3). Juror number six repeatedly affirmed that she would be able to view the instant case impartially and evaluate it solely on the merits. Accordingly, there was no error in failing to dismiss juror number six for cause.

Defendant also argues that his trial counsel was ineffective for failing to exercise a challenge to dismiss juror number six. First, he argues that counsel's failure to exercise a challenge for cause fell below reasonable professional norms. As noted above, however, a challenge for cause would likely have been meritless, as the juror repeatedly disavowed bias and the trial court declined to excuse her on its own motion. Accordingly, counsel's failure to make a challenge for cause was not unreasonable. Further, counsel's decision not to exercise a preemptory challenge could be viewed as a matter of trial strategy. To the extent there was a concern with bias, counsel might have perceived that the bias would be in favor of the grandfather and/or that the juror would look for exacting proofs. Moreover, defense counsel did

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

exercise preemptory challenges on other prospective jurors. Counsel is given wide discretion in matters of trial strategy, and defense counsel's decision to exercise his preemptory challenges on jurors other than juror number six was not objectively unreasonable. *People v Odom*, 276 Mich App. 407, 415; 740 NW2d 557 (2007).

Additionally, defendant cannot show that, but for counsel's failure to challenge juror number six, there is a reasonable probability that the result of his trial would have been different. There was direct testimony from the victim accusing defendant of sexual abuse, and the jury listened to a recorded telephone call in which defendant denied molesting the victim but admitted to touching, embracing and wrestling with the victim while he was naked in his bed. Given the weight of this evidence, defendant cannot show prejudice.

Defendant next argues that the trial court erred by admitting the transcript of the recorded telephone call between defendant and the victim's mother. The recording and transcript were both introduced into evidence without objection. An unpreserved claim of non-constitutional error is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of demonstrating that it is more probable than not that the error affected the outcome of the trial, and even on such a showing, reversal is only warranted if, in the reviewing court's discretion, the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763; *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008).

Defendant asserts that the trial court failed to follow the appropriate procedure for the admission of transcripts as set forth by this Court in *People v Lester*, 172 Mich App 769; 432 NW2d 433 (1988). In *Lester*, this Court found a preference for transcripts where both parties stipulated to the accuracy, but in the absence of such a stipulation held that the transcriber and the trial court should both verify the accuracy of the transcript. *Id.* at 776. Here, the record does not show that the trial court verified the accuracy of the transcript, and the secretary that made the transcription did not testify. However, both the victim's mother and the detective testified that they had reviewed the transcript for accuracy and defendant expressly said that he had no objection to its admission. Given that the record does not reflect any inaccuracy in the transcript, and the fact that defendant waived objection to its admission, it would be impossible to determine that the admission of the transcript was plain, outcome determinative error that resulted in the conviction of an actually innocent defendant.

Defendant further argues that his trial counsel was ineffective for failing to object to the admission of the transcript. However, since there is absolutely no evidence that the transcript of the recorded telephone call was inaccurate, there is no basis for finding that it was objectively unreasonable for trial counsel to choose not to object to the admission of a presumably accurate transcript. Accordingly, the first prong of the ineffective assistance test is not met in this case. Further, defendant has not shown prejudice. There is no claim that the transcript was erroneous, and the jury had the opportunity to listen to the recording itself, as well as read the transcript provided. Thus, there is no reasonable probability that, had trial counsel objected, defendant would have been acquitted.

Defendant also contends that the prosecutor deliberately misrepresented evidence during closing arguments. Remarks made by the prosecution are subject to numerous limitations in order preserve a defendant's right to a fair and impartial trial. Among these limitations is a prohibition on statements that are unsupported by the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). During closing argument, the prosecutor stated that defendant's wife spoke of a confrontation between defendant and the victim's mother after Christmas of 2009, but not about the allegations at issue in this case. The record reflects that defendant's wife merely testified that she saw the victim's mother at that time, not that there was a confrontation. However, defendant failed to object. While this is a mischaracterization of the testimony, it is on a minor point and the jury was properly instructed that closing arguments are not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant's substantial rights were not affected.

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. However, trial counsel's performance did not fall below professional norms. The prosecution's misstatement was minor, and declining to call attention to the misstatement by way of an objection may have been a legitimate trial strategy. Further, due to the proper instruction of the jury and the minor nature of the misstatement at issue, defendant has not and cannot show a reasonable probability that the outcome of his trial would have been different had trial counsel objected.

Defendant next argues that his counsel was ineffective for failing to call the victim's school counselor as a witness. At trial, the victim testified that she reported the sexual abuse to her school counselor. Defendant asserts that competent counsel would have contacted the counselor to investigate the counselor's potential testimony and/or called the counselor as a witness. The record, however, is silent as to whether defense counsel ever contacted the counselor about potential testimony. Since review is limited to mistakes apparent on the record, it is impossible to determine whether counsel erred by failing to contact the school counselor. Further, the decision not to call a witness, particularly a witness who apparently heard the victim speak of being sexually assaulted by defendant, falls squarely in the realm of trial strategy. Accordingly, defendant has not shown that defense counsel's performance fell below prevailing professional norms or that, but for counsel's decision, there is a reasonable probability that defendant would have been acquitted.

Finally, defendant argues that the cumulative effect of the errors, misconduct, and ineffective assistance entitle him to a new trial. However, as outlined above, none of the complained of errors were legitimate errors, nor were any of the alleged instances of ineffective assistance legitimate instances of ineffective assistance. Accordingly, there were no errors to accumulate into any prejudicial effect, and defendant is not entitled to a new trial.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell